IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.338 OF 2005

Dinkar Sitaram Kharade .. Appellant

Versus

Sopan Bhargav Kharade .. Respondent

Mr.Uday Warunjikar for appellant

Mr.Dilip Bodke for respondent

CORAM : P.V.KAKADE, J.

DATE : 29TH JUNE, 2005.

P.C.:

1. The appellant has preferred this appeal against the judgment and order passed by Addl. District Judge, Karad dated 24.2.2005 dismissing the appeal and confirming the judgment and order passed by Civil Judge, Junior Division, Patan dated 3.3.2004 decreeing the suit filed by the plaintiff for perpetual injunction.

2. I have heard the learned counsel for both the

parties. Perused the record.

3. The plaintiff had filed the suit for perpetual injunction simplicitor on the ground that there is a well located in the land of Gat No.714-A and Gat No.714-B situated at village Mouje Nune, Tal. Patan, District Satara. According to him, the land as well as Well therein are his ancestral properties enjoyed exclusively by him alone. The plaintiff has alleged that the defendant had no concerned with the disputed well and had no right over the well water from the said well located in the suit land and since his possession of the well and enjoyment thereof was obstructed by the defendant therefore the suit came to be filed. The defendant filed his written statement challenging the allegations made by the plaintiff with contention that there was a old well in the said Gat numbers and the well was dry and having no use and he had no concerned therewith. However, he submit that he is owner of Gat No.718 and said Gat number consist of well. According to the defendant, he had installed electric motor on the said well and was securing water from the suit well. According to the defendant, the consolidation scheme was implemented in the village in the year 1974 and Gat

No.718 was owned by him was subjected to such scheme when the Gat No.718 was allotted to one Sambhaji Yeshwant Kharade. But the ownership of the well situated in Gat No.718 remains with him and which is exclusively owned by him and hence the suit was sought to be dismissed.

. The learned trial judge adjudicated the dispute and came to the conclusion that the plaintiff had succeeded in proving that the well in Gat No.714-A and 714-B belonged to him exclusively and defendant no.1 was held to have not proved that the suit well was located in Gat No.718 belonged to him. On the basis of such aspect the suit came to be decreed. The appeal was carried to the District Court, Sangli. The learned Addl. District Judge after hearing both sides and perusing the evidence on record confirmed the findings recorded by the lower court and dismissed the appeal. Hence the present appeal.

4. At the outset, it may be noted that even though some questions of law are sought to be raised, in fact there are no substantial questions of law involved in this appeal and the appeal is based only on factual

aspect involved in evidence, which are seen to be properly appreciated by both the courts below.

. The learned counsel for the appellant sought to submit that there were in all three maps drawn in this dispute, which were not tallying with each other. The latest map was called as map drawn by super-Nimtana. According to the learned counsel, such super-Nimtana, after the map drawn by the Court Commissioner which was on record, was not legal and if the plaintiff wanted to bring additional evidence in that regard on record pertaining the disputed well, it was necessary for him to file a separate suit. In support of his contention he has sought to put reliance of Single Judge Judgement of this Court in the case of **Shri Gangadhar Mahadeo Gajakas vs. Shantial Ubhachand Gandhi** reported in **2001(3) All MR 145**, wherein it was held that when DILR appointed as Court Commissioner to undertake measurement and his map is on record, then there is no provision under law for measurement by Nimtana and party can file separate suit if not satisfied with measurement undertaken by Court Commissioner. I have perused this judgment critically and I am satisfied that the ratio laid down by this judgement is not at all applicable to

the present case. It cannot be over looked that all the three maps are drawn by either Surveyor or DILR, which are called either as Nimtana or by super-Nimtana, are consequent to the order of the Court and therefore, by virtue of this aspect the maps must be held as by order of the court under the provisions of Order 26 Rule 9 of Civil Procedure Code i.e. Appointment of Commissioner for local investigation. Perusal of this provision makes it clear that there is no ban imposed upon the court restricting as to how many times the Court Commissioner should be asked to draw maps. Moreover, it is needless to mention that maps on record are drawn for a particular purpose in order to ascertain the correctness of the contentions of the respective parties involved in this dispute. Therefore, I am of the considered view, that the ratio of the case of **Gangadhar Gajakas (Supra)** is not applicable to the present case. Moreover, it also cannot be overlooked that the inherent power under Section 151 of Civil Procedure Code can be invoked in such cases by the Civil Court in order to ascertain the truth of the matter in the course of adjudication of the dispute when it is found that if two maps already drawn under order of the Court are not satisfactory, the third map also could be directed to be

drawn for the purpose of proper and exhaustive adjudication in the suit itself without taking recourse to filing fresh suit for the purpose. In view of this position the so-called question of law sought to be raised in this regard cannot be considered as substantial question of law and therefore, cannot be taken into account. Moreover, the evidence in this regard is sufficiently appreciated by both the courts below in proper perspective.

5. The learned counsel for the appellant further submitted that the suit for perpetual injunction simplicitor without prayer for declaration cannot be entertained by virtue of Section 34 of the Specific Relief Act without asking for consequential declaratory relief. However, it must be noted that the evidence on record has established satisfactorily that the plaintiff had come with the case that the well is owned by the plaintiff exclusively and therefore, he had no reason nor business to seek any declaration in that regard and therefore, the suit for injunction simplicitor in fact is maintainable in law. The question was also sought to be raised regarding electric motor etc., those are question of facts and are seen to be dealt with by the

lower appellate court satisfactorily.

6. Therefore, for the reasons recorded above, I hold that the appeal had no merits and therefore, deserve to be dismissed and stands dismissed with no order as to costs. Consequently the Civil Application No.571 of 2005 is also stands dismissed with no order as to costs.

7. At this stage the learned counsel for the appellant raised the question of electric motor said to be installed by the appellant at the suit well. After hearing the learned counsel for the appellant as well as the respondent, it is directed that the appellant-defendant would be at liberty to take away his electric motor and relevant equipments from the suit well within two weeks from the date of this order.

.